No. 78462-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

TWIN BRIDGE MARINE PARK, L.L.C., and KEN YOUNGSMAN (KEN YOUNGSMAN AND ASSOCIATES),

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Petitioner.

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF WASHINGTON BUSINESS

KRISTOPHER I. TEFFT, WSBA #29366
General Counsel

Association of Washington Business
1414 Cherry Street SE
PO Box 658
Olympia, WA 98507
(360) 943-1600
Attorney for *Amicus Curiae*

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I. INTRODUCTION

The Association of Washington Business ("AWB"), the principal institutional representative of the general business regulated community in Washington, files this brief of *amicus curiae* for three reasons.

First, Petitioner Department of Ecology (herein "Ecology") would ask this court to stray from its recent, well-settled, and well-reasoned defense of administrative finality in land use decisions. In at least five cases since the turn of the most recent century, this court has made it clear that permittees are entitled to rely in good faith on local government land use decisions without fear of collateral attack some months or years after issuance of the permit.

Secondly, as the trial court and Court of Appeals correctly noted, *Twin Bridge Marine Park, L.L.C. v. Dept. of Ecology*, 130 Wn. App. 730, 741, 125 P.3d 155 (2005), there is no meaningful basis from which to distinguish this case from one piece of the aforementioned judicial pentalogy, *Samuel's Furniture, Inc. v. Dept. of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002) (requiring Ecology to file timely petition to challenge local government's determination that project is outside of shoreline jurisdiction). Ecology seeks a judicial rewrite of the Land Use Petition Act, RCW ch. 36.70C ("LUPA"), the Shoreline Management Act, RCW ch. 90.58 ("SMA"), or both, in order to establish what it believes is a

broad oversight and enforcement role over the shoreline permitting decisions of local governments. Whether to import this plenary authority into the SMA is a public policy debate for the Legislature, not for the court in light of well-settled precedent to the contrary.

Thirdly, Ecology's position is inconsistent with the emphasis on local planning decisions set forth in the state's Growth Management Act, RCW ch. 36.70A ("GMA"), the proper vesting of development rights under the GMA, and the deference this court has very recently afforded the planning and permitting decisions of local governments.

For these reasons, AWB urges the court to affirm the decision of the trial court and Court of Appeals.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

AWB, founded in 1904, is the state's oldest and largest general business trade association. AWB represents over 6,100 member businesses, of whom 85 percent are small businesses employing fewer than 50 workers, and who are engaged in all aspects of commerce in Washington. In total, AWB members employ over 650,000 individuals in Washington. Acting as the state's chamber of commerce, AWB is an umbrella organization representing the interests of 114 trade and business associations engaged in industry-specific activities as well as 56 local and regional chambers of commerce across Washington.

One of AWB's largest member segments involves businesses engaged in residential, commercial, or industrial development. These members of the regulated community are applicants for state and local land use permits and must be able to rely on the issuance of these permits in order to conduct their day to day operations. There is accordingly a substantial interest among the AWB membership in maintaining the finality of land use decisions, including enforcement actions for money penalties based upon alleged violations of permit conditions.

III. ISSUE OF CONCERN TO *AMICUS CURIAE*

Whether, pursuant to the SMA, Ecology may penalize the holder of a conditional use permit for allegedly violating the permit's conditions without having first filed a land use petition challenging local jurisdiction's issuance of the permit? *Cf. Pet. for Rev.* at 2 (Issue 1).

IV. STATEMENT OF THE CASE

For the sake of brevity, *amicus curiae* adopts the Statement of the Case set forth by Respondent below. *Br. of Resp't* at 4-5.

V. ARGUMENT

A. ECOLOGY'S POSITION IS INCONSISTENT WITH WASHINGTON'S LONG HISTORY AS A DEFENDER OF ADMINISTRATIVE FINALITY IN LAND USE DECISIONS.

As far back as *Knestis v. Unemployment Compensation and Replacement Div.*, 16 Wn.2d 577, 134 P.2d 76 (1943), this court held that an agency could not revisit a previous decision because the period for appealing the decision had run. *Knestis*, 16 Wn.2d at 579-92. This was true even though in *Knestis* the agency came to believe its previous administrative decision was a "mistake of law." *Knestis*, 16 Wn.2d at 578.

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000), reinforces the rule established in *Knestis*. The issue in *Wenatchee Sportsmen* was essentially the same as the issue in this case: "Does a party's failure to timely appeal a county's approval of a [land use decision] bar it from challenging the validity [of it] in a later action . . . ?" *Wenatchee Sportsmen*, 141 Wn.2d at 175. This court held that, indeed, the failure to timely appeal the rezone at issue in that case under LUPA's 21 day provision was a bar to collateral attack in a subsequent lawsuit. The failure to appeal made the decision final and irrevocable. *Wenatchee Sportsmen*, 141 Wn.2d at 182. Just as with *Knestis*, this court in *Wenatchee Sportsmen* held that even a putatively unlawful approval is final if not timely appealed. As the court put it:

> If there is no challenge to the [land use decision], the decision is valid, the statutory bar against untimely [challenges] must be given effect, and the issue of whether the [land use approval was lawful] is no longer reviewable.

Wenatchee Sportsmen, 141 Wn.2d at 182. The rationale for this decision is that the approval *became* lawful by operation of law – because the challenge was untimely, "approval of the [county's land use decision] became valid once the opportunity to challenge it passed." *Wenatchee Sportsmen*, 141 Wn.2d at 181.

Building upon the rule set forth in *Wenatchee Sportsmen*, this court set forth another robust defense of administrative finality in *Columbia River Gorge Comm'n v. Skamania County*, 144 Wn.2d 30, 26 P.3d 241 (2001). At issue in *Skamania County* was whether the Columbia River Gorge Commission could bring an action against Skamania County to force it to stop Brian and Jody Bea from building a home on their property within the Columbia Gorge National Scenic Area. *Skamania County*, 144 Wn.2d at 34. Skamania County issued a building permit to the Beas over two years earlier and construction was over half completed on their home when the Gorge Commission sued to stop construction and require the Beas to relocate their house on their property. The applicable provisions of the Skamania County Land Use Ordinance and Columbia River National Scenic Area Act mandated that an appeal of any land use

decision arising under either the ordinance or the act occur within either 20 or 30 days, respectively. *Skamania County*, 144 Wn.2d at 40. Holding that the Gorge Commission's failure to timely appeal the issuance of the building permit to the Beas barred it from collaterally attacking the permit in a later lawsuit, this court stated:

> We have also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that '[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property. . . . To make an exception . . . would completely defeat the purpose and policy of the law in making a definite time limit.'

Skamania County, 144 Wn.2d at 49 (quoting *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974)). This court also observed that "had Congress intended to eviscerate the nearly universal rule of administrative finality in land use decisions and grant the Gorge Commission the unusual power that it claims to have, it would have said so expressly and unequivocally." *Skamania County,* 144 Wn.2d at 49. Likewise, had our Legislature intended to allow Ecology civil money penalty authority over alleged violations of permit conditions outside of LUPA, it would have said so expressly and unequivocally by creating an express exemption in LUPA or provision in the SMA.

Not long after *Skamania County*, the court continued this same line of precedent in *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1

(2002) and *Samuel's Furniture, Inc. v. Dept. of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002). In *Nykreim*, the court had to determine whether a county's challenge to a boundary line adjustment its staff granted a property owner some 14 months earlier was time-barred under LUPA. Relying upon this court's "stringent adherence to statutory time limits," *Nykreim*, 146 Wn.2d at 931, the court found the county's challenge untimely. A substantial component of the court's reasoning in *Nykreim* was the precedent by which "[t]his court has also recognized a strong public policy supporting administrative finality in land use decisions." *Id.* at 931. The court found this public policy expressed in the plain language of LUPA, which states:

> The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

RCW 36.70C.010. The *Nykreim* court concluded:

> Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.

Nykreim, 146 Wn.2d at 933.

In *Samuel's Furniture*, about which more will be said *infra*, the court extended the LUPA policy of administrative finality to Ecology's

enforcement authority under the SMA. In *Samuel's Furniture*, the city of Ferndale issued fill and grade and building permits after making a determination that the furniture store's expansion project was not within the shoreline jurisdiction under the city's shoreline master program. Ecology disagreed and threatened enforcement action if the project continued. Samuel's Furniture brought a declaratory judgment action before Ecology could go forward with an enforcement action. Relying in substantial part on "this state's 'strong public policy favoring administrative finality in land use decisions,'" *Samuel's Furniture*, 147 Wn.2d at 458 (quoting *Skamania County*, 144 Wn.2d at 48), the court barred Ecology from taking enforcement action against the furniture store because it failed to timely challenge the underlying permits in a LUPA petition.

Most recently, the court reiterated the policy of finality in land use decisions in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), wherein a citizen group attempted to challenge the issuance and extension of a special use permit for a proposed golf course development without having challenged the permit through a LUPA petition. Finding the *Wenatchee Sportsmen* line controlling, the court simply treated Habitat Watch's challenge as time-barred and dismissed it.

Ecology would apparently ask the court to back away from this five-fold precedent defending the strong public policy of administrative finality in land use decisions. On the contrary, AWB would urge the court to uphold this public policy in the face of Ecology's failure to seek relief under LUPA for its dispute with Twin Bridge Marina. Preventing this kind of arbitrary and fluctuating enforcement policy is why the administrative finality doctrine exists:

> [I]t appears to be well established that a zoning board of appeals or adjustment should not ordinarily be permitted to review its own decisions and revoke action once duly taken. Otherwise there would be no finality to the proceeding; the result would be subject to change at the whim of members or due to the effect of influence exerted upon them, or other undesirable elements tending to uncertainty and impermanence.

State v. Sponburgh, 66 Wn.2d 135, 141, 401 P.2d 635 (1965) (internal citations omitted). Indeed, "[s]ociety suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin." *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). Such is the case here where it is manifestly unjust to the builders, realtors, buyers, bankers, businesses, and all manner of property owners who depend on a reasonable measure of finality and permanence in land use permitting so they may proceed with their projects and enterprises reasonably certain that the rug of will not be pulled out from under them.

B. *SAMUEL'S FURNITURE* IS ON POINT AND CONTROLLING.

At the Court of Appeals, Ecology contended that *Samuel's Furniture* is distinguishable and should be limited to those cases which involve the question of whether prospective development is within the shoreline jurisdiction. *See, e.g., Dept. of Ecology's Opening Br.* at 30-34. Strangely, on petition for review, Ecology has changed its mind and now contends for purposes of the criteria governing acceptance of review that the decision of the Court of Appeals is in conflict with *Samuel's Furniture*. *See Pet. for Rev.* at 10-15. On the contrary, AWB agrees with the trial court and Court of Appeals that *Samuel's Furniture* is on point and controlling.

When Skagit County issued the two shoreline substantial development permits at issue, that action included a determination that development under the permits would be consistent with the SMA and the county's shoreline master program. WAC 173-27-140. This was a final and appealable land use decision under LUPA. RCW 36.70C.020. The logic of *Samuel's Furniture* is that Ecology must challenge this decision under LUPA. Nothing in LUPA or the SMA gives Ecology "independent rights" to pursue penalties apart from challenging the underlying permit through LUPA. Indeed, the court already explained that "[u]sing RCW

90.58.210 to collaterally attack a local government decision would be at odds with the policy of cooperation encompassed in RCW 90.58.050." *Samuel's Furniture*, 147 Wn.2d at 456. If Ecology disagrees with the determination of the local permitting authority, either as to the law or the facts, then Ecology has specific bases for seeking relief under LUPA. RCW 36.70C.130 (standards for granting relief). Yet after *Samuel's Furniture* it is clear that Ecology does not have independent authority under the SMA to exempt itself from the LUPA procedure:

> The blanket enforcement authority sought by Ecology is in sharp contrast to the policy favoring finality in land use decisions. Under Ecology's position, even though a party relies in good faith on a local government determination that the SMA does not apply, and therefore proceeds with construction, it may still be subject to Ecology enforcement action weeks, months, and even years later for failing to obtain a substantial development permit. These belated enforcement actions could result in civil and/or criminal penalties being issued against the party as well as the potential loss of thousands of dollars in construction costs that have already been incurred. Moreover, Ecology's position fails to give a party any notice of an impending enforcement action. Ecology's interpretation of the SMA would leave land owners and developers unable to rely on local government decisions—precisely the evil for which LUPA was enacted to prevent.

Samuel's Furniture, 147 Wn.2d 458-59. AWB agrees with the Court of Appeals, *Twin Bridge*, 130 Wn. App. at 743 n. 7, in noting that if Ecology seeks to vindicate this broad authority over local government permitting, it should do so within the context of a robust public policy debate before the

Legislature, not in an effort to overturn a solid precedent that is solidly on point.

C. ECOLOGY'S POSITION IS INCONSISTENT WITH DEFERENCE TO LOCAL GOVERNMENT PERMIT DECISIONS UNDER THE GMA AND SMA.

"Local jurisdictions with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA." *Habitat Watch*, 155 Wn.2d at 412 (citation omitted). The same is true under the GMA, RCW 36.70A.3201, into which the SMA was incorporated as a fourteenth planning goal in the Regulatory Reform Act of 1995. RCW 36.70A.480 (Laws of 1995, ch. 347, § 104). While the SMA retains its own unique balance of power between Ecology and local permitting jurisdictions, RCW 90.58.050, the SMA also dictates that the permitting system "shall be performed exclusively by the local government." RCW 90.58.140(3). Ecology's assertion of a broad, overarching, independent SMA enforcement scheme is inconsistent with the deference accorded local government permitting decisions and inconsistent with the "bottom-up" regime of the GMA-SMA framework.

As if state agencies had forgotten these basic principles of land use planning, this court on two recent occasions has paused to remind them. In *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), the court shifted from construing a restrictive covenant to opine about the

nature of the GMA as merely a "framework" to guide local planning and permitting. "[T]he GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs." *Viking*, 155 Wn.2d at 125-26.

Similarly, in *Quadrant Corp. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005), the court determined that deference to county planning actions that are consistent with the goals and requirements of the GMA "supersedes deference granted by the APA and courts to administrative bodies in general." *Quadrant*, 154 Wn.2d at 238. In other words, in reviewing local planning and permitting, the flexible choices of the local government are paramount, so long as they are consistent with the law.

These "bottom-up" considerations to modern Washington land use law form an important backdrop to the present case. Local jurisdictions enjoy broad discretion in permitting decisions. It was fully within Skagit County's authority under the GMA and SMA to issue building permits representing the judgment of the county that the Twin Bridge Marine development was consistent with existing shoreline permits and that no further shoreline development permit was necessary. LUPA provides the exclusive means to review this kind of local decision. Ecology's argument to the contrary is inconsistent with the local-deference, bottom-up nature

of land use and shoreline permitting. Nothing could be more "top down" than an agency's theory of enforcement that allows it to bypass existing land use appeal procedures and simply penalize a permittee for conduct allowed by the local jurisdiction but disapproved by the state agency. As *Samuel's Furniture* confirms, neither LUPA nor the SMA, nor the entire GMA-SMA modern land use framework, grants this kind of administrative primacy to state agencies. Ecology's argument for expansive enforcement powers outside of LUPA should be rejected, or at best redirected to the Legislature where it more appropriately belongs.

VI. CONCLUSION

Based on the foregoing, AWB asks the court to affirm the decision of the trial court and Court of Appeals.

Respectfully submitted this 20th day of February, 2007.

ASSOCIATION OF
WASHINGTON BUSINESS

Kristopher I. Tefft
WSBA #29366
Attorney for *Amicus Curiae*